Undertakers.
Variety shops.
Watch, clock and jewelry repair establishments.

[36 FR 14466, Aug. 6, 1971]

§ 779.321 Inapplicability of "retail concept" to some types of sales or services of an eligible establishment.

(a) Only those sales or services to which the retail concept applies may be recognized as retail sales of goods or services for purposes of the exemption. The fact that the particular establishment may have a concept of retailability, in that it makes sales of types which may be recognized as retail, is not determinative unless the requisite portion of its annual dollar volume is derived from particular sales of its goods and services which have a concept of retailability. Thus, the mere fact that an establishment is of a type noted in § 779.320 does not mean that any particular sales of such establishment are within the retail concept. As to each particular sale of goods or services, an initial question that must be answered is whether the sales of goods or services of the particular type involved can ever be recognized as retail. The Supreme Court in *Wirtz* v. *Steepleton General Tire Co.*, 383 U.S. 190, confirmed the Department's position that (1) The concept of ''retailability'' must apply to particular sales of the establishment, as well as the establishment or business as a whole, and (2) even as to the establishment whose sales are ''variegated'' and include retail sales, that nonetheless classification of particular sales of goods or services as ever coming within the concept of retailability must be made. Sales of some particular types of goods or services may be decisively classified as nonretail on the ground that such particular types of goods or services cannot ever qualify as retail whatever the terms of sale, regardless of the industry usage or classification.

(b) An establishment is, therefore, not automatically exempt upon a finding that it is of the type to which the retail concept of selling or servicing is applicable; it must meet all the tests specified in the Act in order to qualify for exemption. Thus, for example, an establishment may be engaged in repairing household refrigerators, and in addition it may be selling and repairing manufacturing machinery for manufacturing establishments. The retail concept does not apply to the latter activities. In such case, the exemption will not apply if the annual dollar volume derived from the selling and servicing of such machinery, and from any other sales and services which are not recognized as retail sales or services, and from sales of goods or services for resale exceeds 25 percent of the establishment's total annual dollar volume of sales of goods or services.

(c) Since there is no retail concept in the construction industry, gross receipts from construction activities of any establishment also engaged in retail selling must be counted as dollar volume from sales not recognized as retail in applying the percentage tests of section 13(a)(2). Also, since construction and the distribution of goods are entirely dissimilar activities performed in industries traditionally recognized as wholly separate and distinct from each other, an employee engaged in construction activities is not employed within the scope of his employer's otherwise exempt retail business in any week in which the employee engages in such construction work, and is therefore (see § 779.308) not employed ''by'' a retail or service establishment within the meaning of the Act in such workweek.

(d) Certain business establishments engage in the retail sale to the general public, as goods delivered to purchasers at a stipulated price, of items such as certain plumbing and heating equipment, electrical fixtures and supplies, and fencing and siding for residential installation. In addition to selling the goods they may also install, at an additional charge, the goods which are sold. Installation which is incidental to a retail sale (as distinguished from a construction or reconstruction contract to do a building alteration, or repair job at a contract price for materials and labor required, see § 779.355(a)(1) is considered an exempt activity. By way of example, if the installation for the customer of such goods sold to him at retail requires only minor carpentry, plumbing or electrical work (as may be

the case where ordinary plumbing fixtures, or household items such as stoves, garbage disposals, attic fans, or window air conditioners are being installed or replaced), or where only labor of the type required for the usual installation of chain link fences around a home or small business establishment is involved, will normally be considered as incidental to the retail sale of the goods involved (unless, of course, the transaction between the parties is for a construction job at an overall price for the job, involving no retail sale of goods as such). In determining whether such an installation is incidental to a retail sale or constitutes a nonretail construction activity, it is necessary to consider the general characteristics of the entire transaction. Where one or more of the following conditions are present, the installation will normally be considered a construction activity rather than incidental to a retail sale:

(1) The cost to the purchaser of the installation in relation to the sale price of the goods is substantial;

(2) The installation involves substantial structural changes, extensive labor, planning or the use of specialized equipment;

(3) The goods are being installed in conjunction with the construction of a new home or other structure; or

(4) The goods installed are of a specialized type which the general consuming public does not ordinarily have occasion to use.

(e) An auxiliary employee of an exempt retail or service establishment performing clerical, maintenance, or custodial work in the exempt establishment which is related to the establishment's construction activities will, for enforcement purposes, be considered exempt in any workweek if no more than 20 percent of his time is spent in such work.

''RECOGNIZED'' AS RETAIL ''IN THE PARTICULAR INDUSTRY''

§ 779.322 Second requirement for qualifying as a "retail or service establishment."

If the business is one to which the retail concept is applicable then the second requirement for qualifying as a ''retail or service establishment'' within that term's statutory definition is that 75 percent of the establishment's annual dollar volume must be derived from sales of goods or services (or of both) which are recognized as retail sales or services in the particular industry. Under the Act, this requirement is distinct from the requirement that 75 percent of annual dollar volume be from sales of goods or services ''not for resale'' (§ 779.329); many sales which are not for resale lack a retail concept and the fact that a sale is not for resale cannot establish that it is recognized as retail in a particular industry. (See *Wirtz* v. *Steepleton General Tire Co.*, 383 U.S. 190.) To determine whether the sales or services of an establishment are recognized as retail sales or services in the particular industry, we must inquire into what is meant by the terms ''recognized'' and ''in the particular industry,'' and into the functions of the Secretary and the courts in determining whether the sales are recognized as retail in the industry.

§ 779.323 Particular industry.

In order to determine whether a sale or service is recognized as a retail sale or service in the ''particular industry'' it is necessary to identify the ''particular'' industry to which the sale or service belongs. Some situations are clear and present no difficulty. The sale of clothes, for example, belongs to the clothing industry and the sale of ice belongs to the ice industry. In other situations, a sale or service is not so easily earmarked and a wide area of overlapping exists. Household appliances are sold by public utilities as well as by department stores and by stores specializing in the sale of such goods; and tires are sold by manufacturers' outlets, by independent tire dealers and by other types of outlets. In these cases, a fair determination as to whether a sale or service is recognized as retail in the ''particular'' industry may be made by giving to the term ''industry'' its broad statutory definition as a ''group of industries'' and thus including all industries wherein a significant quantity of the particular product or service is sold. For example, in determining whether a sale of lumber is a retail sale, it is the recognition the sale of lumber occupies